APPENDIX C.

Defendant's Additional Motion for New Trial Pursuant to Federal Rule of Civil Procedure 60(b).

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION.

CIVIL ACTION

No. 8311.

WALLACE BUTTS,

Plaintiff,

v.

CURTIS PUBLISHING COMPANY,

Defendant.

Because of the drastic change in the law of libel and the constitutional restrictions placed upon an action for libel brought about by the Supreme Court's recent decision, on March 9, 1964, in the case of *New York Times Company v. Sullivan,* 32 U. S. Law Week 4184 (March 10, 1964), the defendant hereby moves this Court, pursuant to Rule 60(b)(6) to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. The verdict and judgment in this case awarded plaintiff damages for injury to his reputation as a football coach on account of statements made by defendant concerning plaintiff's actions while acting as Director of Athletics of the University of Georgia. The Director of Athletics of the University of Georgia is a public official: *Page v. Regents of University of Georgia,* 93 F. 2d 887 (5th Cir., 1937) (reversed in 304 U. S. 439 upon other grounds).

2. Said *New York Times Company v. Sullivan* case held that the constitutional guarantees provided by the First and Fourteenth Amendments prohibit a public official from recovering *any* "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false, or with reckless disregard of whether it was false or not."

3. The following portions of the instruction given by the Court to the jury constitute error in that the Court stated that general damages could be recovered by the plaintiff without the plaintiff being required to prove the existence of "actual malice" on the part of the defendant:

> "I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication." R. 1624,

"As the publication was libelous per se, I charge you that malice is to be inferred. However, the existence of malice may be rebutted by proof of the defendant which, in all cases, shall go in mitigation of damages.

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact." R. 1630.

4. Applying the constitutional standards enunciated in the said *New York Times Company v. Sullivan* case, the proof presented in the instant case to show actual malice on the part of the defendant lacks the "convincing clarity", which such constitutional standards demand, and thus such evidence cannot sustain the judgment entered for the plaintiff. There was no evidence introduced in the instant case to prove that the statements made in the article defendant published in the March 23, 1963 issue of "The Saturday Evening Post" concerning plaintiff were made with knowledge on the part of the defendant that they were false, or with a reckless disregard of whether they were false or not. On the contrary, plaintiff proved in his own case that the Post editors responsible for the publication of the story—Blair and Thomas, R. 1024—were satisfied of the truthfulness and accuracy of the story. R. 1038, 1137-1138.

Therefore, the instant case was clearly tried upon unconstitutional assumptions, the correct principle unfortunately not being announced until after the trial by the Supreme Court's landmark decision in the *New York Times Company v. Sullivan* case. As Mr. Justice Goldberg recognized in that case, "we are writing upon a clean slate."

A hearing upon this Motion is respectfully requested.

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